DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 05-0320
Sales and Use Tax
For The Tax Period 2001-2003

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

Issues

I. Sales and Use Tax – Complimentary Meals and Merchandise

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1(a); IC § 6-2.5-1-2(a); IC 6-2.5-4-1(b); *Monarch Beverage Col, Inc v. Ind. Dep't of State Revenue,* 589 N.E.2d 1209 (Ind. Tax Ct. 1992).

The Taxpayer protests the imposition of sales tax on certain meals and merchandise.

II. Tax Administration- Ten Percent Negligence Penalty

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b).

The Taxpayer protests the imposition of the ten percent negligence penalty.

Statement of Facts

The Taxpayer operates a riverboat casino. The Taxpayer requested a refund of certain sales and use taxes paid for the tax period 2001. After an audit, the Indiana Department of Revenue (Department) denied the claim for refund and assessed additional sales and use tax, interest, and penalty for the years 2001-2003. The taxpayer protested a portion of the assessments. A hearing was held. This Letter of Findings results.

I. Sales and Use Tax- Complimentary Meals and Merchandise

Discussion

The Department assessed sales tax on the Taxpayer's sales of meals and gift shop items to patrons who paid by presentation of "manual complimentary slips" and "LSI (computerized) paperless complimentary offsets." The Taxpayer protested these assessments contending that the transfers were not sales subject to sales tax. Rather, the Taxpayer characterized these transfers as nontaxable complimentary transfers.

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. IC § 6-8.1-5-1(b). The Taxpayer bears the burden of proving that the assessment is incorrect. Id.

Indiana imposes a sales tax on "retail transactions made in Indiana" at IC § 6-2.5-2-1(a). A "retail transaction" is defined at IC § 6-2.5-1-2(a) as "a transaction of a retail merchant that constitutes selling at retail. . . ."

A transaction constitutes selling at retail if it meets the following elements of a sale at retail pursuant to IC § 6-2.5-4-1(b):

> A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
> (1) acquires tangible personal property for the purpose of resale; and
> (2) transfers that property to another person for consideration.

If a retailer purchases tangible personal property in order to resell it and actually transfers that property to another in exchange for consideration, there is a retail sale subject to the Indiana sales tax. In this situation, there is agreement that the first element of a retail sale subject to sales tax is met – the Taxpayer acquires tangible personal property for resale and transfers the property (meals, drinks, and gift shop merchandise) to others in the ordinary course of its business. The issue to be determined in this case is whether or not the Taxpayer receives consideration for the transfer of the food, drinks, and gift shop items and therefore actually sells the items in a retail sale subject to Indiana sales tax.

To determine if the Taxpayer actually receives consideration from its patrons in exchange for the meals and merchandise, one must first determine what "consideration" is. In *Monarch Beverage Col, Inc v. Ind. Dep't of State Revenue*, 589 N.E.2d 1209 (Ind. Tax Ct. 1992), the Tax Court discussed the term "consideration" as used in IC § 6-2.5-4-1(b)(2). The court stated,

> The concept of consideration evolved from the law of contracts. In order to have a legally binding contract there must generally be an offer, acceptance, and consideration. Consideration is essential to every contract. Indiana has long held that consideration in the form of money is not essential to a binding contract. A mere promise is sufficient as consideration if it is the result of a bargained for exchange. Moreover, a benefit to the promisor or a detriment to the promisee is sufficient as consideration. 'The doing of an act by one at the request of another which may have a detrimental inconvenience, however slight, to the party doing it or may be a benefit, however slight, to the party at whose request it is performed, is legal consideration for a promise by such requesting party.'

In the transactions in question, the Taxpayer's patrons – who are members of the Players Club – pay the Taxpayer for prepared meals, drinks, and merchandise by one of two

methods –manual complimentary slips or LSI (computerized) paperless complimentary offsets. As their name imply, the manual complimentary slips are handwritten on a piece of paper. The LSI (computerized) paperless complimentary offsets are electronic. Both of these are essentially vouchers. Players Club members earn these by playing at the gaming tables. Patrons present their Players Club cards at the gaming tables. Taxpayer's employees manually record information on the Club members' gambling activity at the gaming tables. The Players Club members turn in the manually recorded information to the Taxpayer for the manual complimentary slips or LSI (computerized) paperless complimentary offsets or vouchers. Taxpayer's employees determine how much the vouchers are worth by analyzing the Players Club members' amount of play at the gaming tables, the games played, the amount wagered, and the player's skill level. The Players Club members exchange the vouchers for gift shop merchandise, food, and drinks at the regularly listed prices.

Although the vouchers cannot be exchanged for cash, they have a specific value. In the exchange, the Players Club members receive the benefit of the promised tangible personal property — the food, drinks, and merchandise. The Taxpayer sustains the detrimental inconvenience of giving the food, drinks, and merchandise to the Players Club members. This is not a discounted coupon situation. Rather, the Players Club members use their vouchers to pay full price for the merchandise and meals.

The Taxpayer's patrons exchange consideration for the meals and merchandise they receive from the Taxpayer in the subject transactions. The transactions met the statutory definition of a retail sale subject to the sales tax. The Department properly imposed sales tax.

Finding

The Taxpayer's protest is respectfully denied.

II. Tax Administration- Ten Percent Negligence Penalty

Discussion

The Taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall

> be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Taxpayer failed to pay sales or use tax on clearly taxable items such as a plasma television and lockers. These breaches of the Taxpayer's duty to properly remit tax to the state constituted negligence.

Finding

The Taxpayer's protest is denied.

KMA/BK/DK – January 17, 2007